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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOUTH WESTERN FEDERAL CREDIT  
UNION,

Plaintiff and Appellant,

v.

KENNEDY EASTON, LLC,

Defendant and Respondent.

G042181

(Super. Ct. No. 30-2008 00104522)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal.Const.) Motion to correct the record. Judgment reversed and remanded. Motion granted.

Anderson, McPharlin & Connors, Eric A. Schneider and Paula G. Tripp for Plaintiff and Appellant.

Ferruzzo & Ferruzzo, Gregory J. Ferruzzo and Adam K. Obeid for Defendant and Respondent.

Plaintiff South Western Federal Credit Union finances automobile purchases under a contractual arrangement with defendant Kennedy Easton, LLC an automobile dealer. Plaintiff appeals from a judgment following a bench trial, which found that defendant did not breach the contract by providing misleading information about the value of automobiles plaintiff financed. The judgment did determine defendant was liable for negligent misrepresentations and awarded damages to plaintiff. Plaintiff contends the finding that defendant provided misleading information necessarily compels the conclusion it breached the contract. We agree and reverse the judgment. Plaintiff also asserts that the trial court used the wrong measure of damages in determining the amount to which it is entitled as a result of the negligent misrepresentation. Because we hold the contract was breached entitling plaintiff to damages, it is unnecessary for us to separately deal with the issue of damages for negligent misrepresentation because they would be duplicative of the breach of contract damages.

## FACTS

### *1. The Contract*

Defendant, called “Dealer” in the contract, entered into a “CU Direct Corporation Agreement” (bold and capitalization omitted) contract with CU Direct Corporation (CUDC). The contract granted defendant a license to use an Internet-based program set up to permit assignment of retail installment contracts from automobile dealers to credit unions. Plaintiff participates in the program and the parties agree that it is a third party beneficiary of the contract.

The contract contains the following provisions:

“5. Dealer Duties – Dealer shall have [credit union m]ember properly complete in its entirety [the specified form] or such other form approved for use by CUDC (the ‘Application Form’). . . . Dealer shall properly complete and cause

the [credit union m]ember and any co-buyer to execute the loan documents using the latest revised version of the [applicable form] (the ‘Loan Form’) or such other form approved for use by CUDC. . . . Within three days after execution of the Loan Form, Dealer shall deliver the Application Form and the executed Loan Form to the Lender.”

“7. Lender Duties - . . . Lender may reject any CUDL approved loan submitted to it by Dealer for the following reasons: [¶] . . . [¶] b. Fraud on the Application Form or [f]raud on any other form incidental to a loan transaction arising out of this Agreement . . . .”

“15. Dealer Representations and Warranties – Dealer represents and warrants the following: [¶] . . . [¶] b. All information, specifically including the description of the collateral, on the Loan Form is accurate and complete; [¶]. . . [¶] . . . j. Dealer has not knowingly communicated to Lender incorrect information relating to the [m]ember’s or co-buyer’s Application Form or knowingly failed to communicate information relating to the Application Form; [¶] k. The facts set out in the Loan Form are true . . . .”

“17. Dealer Breach – In the event of a breach by Dealer of any of the warranties, obligations or promises herein, Dealer agrees to pay all costs and expenses of Lender and CUDC, including attorney[] fees.”

“21. Default, Remedies – The occurrence of any of the following shall constitute a material default and breach of this Agreement: [¶] . . . [¶] d. If any warranty, representation or statement made or furnished to CUDC by or on behalf of Dealer, in connection with this Agreement or any agreement or Loan Form purchased by Lender is false or has been breached[.] [¶] In the event of any default or breach by Dealer, CUDC may at any time thereafter, at CUDC’s option and without limiting the Lender in the exercise of any other right or remedy which any Lender may have by reason of such default or breach, with or without notice

or demand: [¶] . . . [¶] b. If the default relates to a specific Loan Form, repurchase the Loan Form from the appropriate Lender and immediately pay to such Lender a price equal to the sum of the unpaid balance on the loan, plus any additional costs, including attorney[] fees, incurred by that Lender . . . .”

“24. Further Assurances – Dealer understands that each party shall do such further acts and things and execute and deliver such further documents as are reasonably necessary to carry into effect this Agreement or to better assure and confirm to the requesting party its rights, powers and remedies.”

“29. Third Party Beneficiary – Credit Unions participating in the CUDL program are third party beneficiaries of this Agreement.”

## *2. The Transactions*

Defendant sold a 2001 Ford Expedition to Mario Barragan. A “Loan Application Worksheet” stated that the amount of the loan requested was \$23,282 and the “Blue Book Retail” value of the vehicle was \$18,439. Plaintiff’s internal guidelines provided for financing up to 120 percent of the value of the vehicle. Plaintiff’s loan representative computed that the maximum loan would be 120 percent of \$18,439, or \$22,126. After obtaining approval from her manager, she electronically transmitted a counter offer to defendant in that amount. Thereafter, plaintiff received the “loan packet” from defendant, which signified that the counter offer was accepted. The loan packet included the conditional sales contract and a Kelley Blue Book “Wholesale/Retail Breakdown.” The latter document listed a number of optional equipment items and showed a wholesale value of \$15,025 and a retail value of \$20,070.

A week or so later, defendant sold a 2005 Nissan Armada to Teresa Jiminez for \$39,068. The “Loan Application Worksheet” showed that “Blue Book Retail” was \$34,285. Plaintiff’s representative approved that loan in the full amount. The Kelley Blue Book “Wholesale/Retail Breakdown” subsequently transmitted by defendant to

plaintiff also listed a number of optional equipment items and showed a wholesale value of \$28,625 and a retail value of \$34,285.

Eight months after the purchase, Barragan surrendered his vehicle because of dissatisfaction with its performance. A few months later, Jiminez surrendered her car because she was unable to make further payments. Plaintiff subsequently discovered that neither vehicle had been equipped as it had been described in the Kelley Blue Book “Wholesale/Retail Breakdown” defendant had supplied. Deleting the missing equipment from the Kelley Blue Book breakdowns shows that the value of the Ford Expedition had been overstated by \$2,465 and the Nissan Armada by \$3,365.

### *3. The Lawsuit*

Plaintiff’s complaint contains six causes of action, three related to each transaction, for breach of contract, fraud, and negligent misrepresentation. Both breach of contract causes of action allege that defendant submitted false loan documents, specifically the blue book value of the vehicles. The complaint further alleges that, “[i]n accordance with paragraph 20(d) of the Agreement,” plaintiff demanded defendant “repurchase the [] loan with interest and costs.” The reference to paragraph 20(d) appears to be a typographical error; the correct paragraph is 21(b), which provides: “If the default relates to a specific Loan Form, [Dealer shall] repurchase the Loan Form from the appropriate Lender and immediately pay to such Lender a price equal to the sum of the unpaid balance on the loan, plus any additional costs, including attorney[] fees, incurred by that Lender[.]” In effect, the complaint sought rescission pursuant to the terms of the contract.

After a bench trial, the court issued a statement of decision, which included the following findings:

“3. [Defendant] provided [plaintiff] with the contracts set forth in Exhibits 1 and 12 [the loan agreements with the buyers of the vehicles] and the Loan

Application Work Sheets . . . . [Defendant] provided [plaintiff] with all information required by the . . . contract.

“4. An oral agreement existed between [defendant] and [plaintiff] that [plaintiff] be provided Kelly Blue Book breakdowns . . . . Accordingly, any misrepresentation contained in these exhibits may have constituted a breach of the oral agreement, but not the [CU Direct Corporation Agreement].

. . .

“8. [Defendant] had a duty to disclose to [plaintiff] all relevant information concerning the vehicles involved in this matter. Such information included an accurate designation of the accessories each of the vehicles contained. [Defendant] breached this duty by listing . . . accessories that the vehicles did not contain, thus negligently overstating the value of the vehicle and its accessories. [Plaintiff] relied on the overstated values in determining the maximum amount it would finance in connection with these vehicles.

“9. [Plaintiff] was damaged as a result of the negligent misrepresentations of [defendant], in a sum equal to the difference in what it loaned based upon the misrepresentation and what it would have loaned if the representations were accurate.”

The court then determined plaintiff did not meet its burden to prove fraud, gave defendant judgment on the breach of contract causes of action, and awarded plaintiff \$4,564, with interest, for negligent misrepresentation.

Defendant moved to have the record corrected. In its statement of decision, the court stated, “any false representations contained in Exhibits 5 and 16, *did constitute* a material breach of the CUDC contract.” (Italics added.) Based on the judgment, it seems clear the court meant to state “*did not constitute.*” During oral argument, the parties stipulated that this was a clerical error and we grant defendant’s motion to correct the record on that basis.

## DISCUSSION

The trial court concluded there was no breach of the written contract. Defendant supports this decision by pointing to provisions in the contract that required the submission of certain specified documents and contends there were no misrepresentations in these documents. Paragraph 5 of the contract refers specifically to the Application Form and the Loan Form and they contained no false representations. It argues the trial court therefore concluded the Kelly Blue Book information, which was not contained in either of these forms, was provided pursuant to a separate oral agreement. But there is no evidence of any such oral agreement.

The trial court's analysis also overlooks the reference to "any other form incidental to a loan transaction arising out of this Agreement" in paragraph 7 of the contract. And paragraph 15 (b) and (j) provides that "[a]ll information, specifically including the description of the collateral, on the Loan Form is accurate and complete" and that "Dealer has not knowingly communicated to Lender incorrect information relating to the [m]ember's or co-buyer's Application Form or knowingly failed to communicate information relating to the Application Form." Paragraph 21 (d) provides that "[i]f *any* warranty, representation or statement made or furnished to CUDC by or on behalf of Dealer, *in connection with this Agreement* or any agreement or Loan Form purchased by Lender is false or has been breached" (italics added), a material breach results. Finally paragraph 24 states the dealer might be required to furnish documentation in addition to the specified forms.

Thus, the written contract contemplated defendant might be required to provide additional documentation to support the transaction. And, in fact, under the arrangement between the parties, defendant was required to submit the Kelly Blue Book valuations. This was a part of the requirements of the contract and not a requirement imposed by some unspecified oral agreement.

As defendant notes in its brief, our task is to determine whether there is substantial evidence supporting the findings of the court. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) There is no evidence of an oral agreement. There is only evidence of the contract, and the court's finding defendant misrepresented the value of the vehicles necessarily means this constituted a breach under paragraph 21 of that contract.

“When one party has been injured by a breach of contract and [it] either lacks the ability or the desire to keep the contract alive, [it] can choose between two different remedies. [Citation.] [It] can treat the contract as rescinded and recover damages resulting from the rescission. Or [it] can treat the contract as repudiated by the other party and recover damages to which [it] would have been entitled had the other party not breached the contract . . . . [Citation.]” (*Akin v. Certain Underwriters At Lloyd's London* (2006) 140 Cal.App.4th 291, 296.) Here plaintiff sought to rescind the contract as it was entitled to do under paragraph 21 of the contract. As such, plaintiff was entitled to recover “the sum of the unpaid balance on the loan, plus any additional costs, including attorney[] fees, incurred . . . .” We will remand the case to the trial court to determine this amount.

Plaintiff also contends the damages awarded under the negligent misrepresentation cause of action were inadequate. But, once plaintiff recovers damages for the breach of contract as determined above, it will have recovered all damages sustained both as a result of the breach of contract and the misrepresentation. The record does not show plaintiff sustained additional damages because of the misrepresentation. It is therefore unnecessary for us to address the proper measure of damages for the negligent misrepresentation.



## DISPOSITION

Respondent's motion to correct the record is granted. The judgment is reversed. The matter is remanded to the trial court to determine the amount of damages for breach of contract to which appellant is entitled. Damages shall consist of unpaid balances on the loans plus any additional costs, including attorney fees incurred by appellant. This also includes appellant's costs and attorney fees incurred in this appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.